No. 93-370

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

PASCAL DEBRAINE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Confrontation Clause bars the consideration of hearsay evidence at sentencing hearings.

2. Whether a court may consider extrinsic corroborating evidence in determining whether hearsay evidence is reliable for use at sentencing.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. A71-A90, is reported at 982 F.2d 1365.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1993. A petition for rehearing was denied on May 26, 1993. Pet. App. B1-B3. The petition for a writ of certiorari was filed on August 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioners were convicted of conspiring to distribute more than 500 grams of cocaine (21 U.S.C. 846) and multiple related offenses. The district court sentenced petitioner Pascal Debraine to a term of 211 months' imprisonment, petitioner Robert Petty to a term of 360 months' imprisonment,[1] petitioner Melvin DeWitt to a term of 188 months' imprisonment, petitioner Gary Granger to a term of 240 months' imprisonment, and petitioner Jordan Quintal to a term of 211 months' imprisonment. 7/27/90 Tr. 185, 191, 209, 217-218, 227.

The court of appeals affirmed most of petitioners' convictions and upheld the district court's consideration of hearsay evidence at petitioners' sentencing. The court reversed the convictions of Petty, DeWitt, Debraine, and Quintal on one count of the indictment, reversed the convictions of Granger on nine of his 14 counts of conviction, vacated the sentences of Petty and Quintal, and remanded the cases of all five petitioners for resentencing. See Pet. App. A82; *United States* v. *Kessack*, No. 90-30240 (9th Cir. Jan. 7, 1993), slip op. 3; *United States* v. *Petty*, 992 F.2d 887, 891 (9th Cir. 1993); *United States* v. *Petty*, 992 F.2d 1015, 1015-1016 (9th Cir. 1993).[2]

1. Donald Kessack was the kingpin in a conspiracy to distribute cocaine that was in existence from 1984 to 1989; petitioners were members of the conspiracy. After

[1] The petition's statement, Pet. 6 n.2, that Petty was sentenced to 188 months' imprisonment is incorrect. See 7/27/90 Tr. 185.

[2] The court of appeals also affirmed the convictions and 30-year sentence of co-conspirator Donald Kessack. *United States* v. *Kessack*, slip op. 3.

Kessack's arrest, he entered into plea negotiations with the government. On October 31, 1989, in the course of those negotiations, he proffered a statement under oath to the government. Kessack made the proffer in order to induce the government to agree to a plea bargain. A condition of the proffer was that the government would not use the information it contained against Kessack in any way other than to impeach him if he later gave testimony that was inconsistent with the proffer. Kessack's plea negotiations failed, however, and he went to trial with his co-conspirators, including petitioners. Pet. App. A75.

Kessack and petitioners were convicted on April 4, 1990. The government moved for the expedited sentencing of Kessack, and the district court sentenced him to a term of 30 years' imprisonment without considering the sworn statement he had proffered to the government. Pet. App. A75; 6/22/90 Tr. 13, 52-53. At the sentencing hearing, Kessack argued that he was entitled to a sentence reduction for acceptance of responsibility because his proffered statement was a voluntary and truthful admission of his involvement in the offenses of conviction and related conduct. *Id.* at 14, 24.

Two weeks later, at petitioners' sentencing hearing, after the district court said that it would not consider the Kessack proffer in sentencing petitioners, 7/6/90 Tr. 4, the government called Kessack as a witness. He refused to testify, invoking his Fifth Amendment privilege against compelled self-incrimination. *Id.* at 57-58. The government moved for an order compelling him to testify, and the district court granted the motion. Kessack persisted in his refusal to answer any questions. *Id.* at 62, 64. The government then asked the district court to unseal and review Kessack's proffered statement. *Id.* at 64. The court did so and, on July 13,

1990, notified petitioners that it had reviewed Kessack's statement and had considered its contents for purposes of sentencing petitioners. Pet. App. A75. On July 23, 1990, Kessack made a second sworn statement, in which he cast doubt on the accuracy and reliability of his earlier statement. *Id.* at A75-A76; see 7/27/90 Tr. 151-152, 153.

Petitioners' sentencing hearing resumed on July 27, 1990. Relying on information in the first Kessack statement, which the district court found to be corroborated by other evidence in the record, the court determined that the entire conspiracy involved more than 50 kilograms of cocaine.[3] The court attributed 50 kilograms to petitioners Petty and Debraine, and attributed 15-49.99 kilograms to petitioners Quintal and DeWitt. The court held Quintal and DeWitt responsible for the lesser amount because it was unable to find by a preponderance of the evidence that Quintal and DeWitt were part of the conspiracy throughout its existence, that they had dealt with 50 or more kilograms of cocaine, or that they knew or had reason to know that the conspiracy would involve 50 or more kilograms of cocaine. Pet. App. A76; 7/27/90 Tr. 168-171.

2. A divided court of appeals upheld the district court's consideration of the Kessack proffer at sentencing. Pet. App. A72-A90. The panel majority first rejected, *id.* at A76-A79, the claim that because Kessack's proffered statement was hearsay, the Confrotation Clause barred its consideration at sentencing. Noting that seven courts of appeals had already ruled that the Confrontation Clause does not apply at sentencing under

[3] In his proffer, Kessack had estimated that the conspiracy distributed 280-305 kilograms of cocaine between 1984 and 1989. See 7/27/90 Tr. 169.

the Sentencing Guidelines, and that three other courts of appeals had held that due process does not require confrontation at sentencing under the Guidelines, *id.* at A77-A78 & A77 n.2, the court concluded that the Guidelines, which contemplate the consideration of reliable hearsay, Sentencing Guidelines § 6A1.3, Commentary, had not changed the pre-Guidelines rule permitting sentencing courts to consider reliable hearsay, see *Williams* v. *New York*, 337 U.S. 241 (1949).

The majority acknowledged, Pet. App. A79, that petitioners had a due process right not to be sentenced on the basis of materially incorrect information. It found, *id.* at A80-A81, however, that in view of the corroborating evidence available to the district court, that court had not abused its discretion in concluding that the Kessack proffer was sufficiently reliable to be considered at sentencing. The majority rejected, *id.* at A81-A82, the contention that *Idaho* v. *Wright*, 497 U.S. 805 (1990), bars consideration of extrinsic corroborating evidence at sentencing to determine whether hearsay was reliable.

Judge Noonan dissented. Pet. App. A83-A90. He concluded, *id.* at A83-A88, that the Confrontation Clause applies by its terms "[i]n all criminal prosecutions," and thus should have applied at petitioners' sentencing. He reasoned, Pet. App. A83-A84, that because most federal criminal prosecutions end in guilty pleas, the sentencing proceeding was the "only significant event" in those prosecutions, and that because under the sentencing regime introduced by the Guidelines, the facts accepted as established at the sentencing hearing determine the sentence, the Confrontation Clause should have been flexibly applied to bar consideration of the "inherently untrustworthy" Kessack statement. *Id.* at A85-A88. Judge Noonan also concluded, *id.* at A88-A90, that the

Kessack proffer, as "unalloyed allegation," was so "inherently unreliable" as to violate due process as well.

ARGUMENT

1. Petitioners contend that the Confrontation Clause of the Sixth Amendment barred the district court from considering the Kessack statement at sentencing. Pet. 16-31.[4] They argue specifically that the court of appeals erred in interpreting *Williams* v. *New York*, 337 U.S. at 245, 249-250, to permit consideration of hearsay evidence at sentencing proceedings under the Guidelines, Pet. 18-23, and that the provisions in the Sentencing Guidelines permitting consideration of hearsay evidence are inconsistent with, and must yield to, the requirements of the Confrontation Clause. Those contentions do not warrant review by this Court.[5]

It is well settled that at sentencing a district court has wide discretion to determine what information to consider and what weight to give it. As this Court has explained, a sentencing judge may "conduct an inquiry broad in scope, largely unlimited either as to the kind of

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[4] Although petitioners are correct in their statement, Pet. 2 n.1, that Granger was sentenced on the basis of Kessack's proffered statement, it does not appear that he sought review of his sentence on that ground in the court of appeals. See Pet. App. A72-A73. He therefore may not seek review of that sentence in this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

[5] Petitioners contend that this Court should decide, as a threshold matter, whether a sentencing hearing is a "criminal prosecution" within the meaning of the Sixth Amendment. Pet. 16-18. Whether or not sentencing proceedings are denominated "criminal prosecutions," it is settled that sentencing does not call for the full range of Sixth Amendment guarantees. See, *e.g.*, *Spaziano* v. *Florida*, 468 U.S. 447, 460 (1984) (Sixth Amendment does not provide defendant with right to jury trial in sentencing).

information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). The Federal Rules of Evidence are expressly made inapplicable to sentencing hearings. Fed. R. Evid. 1101(d)(3). Moreover, under the Sentencing Reform Act of 1984, 18 U.S.C. 3551-3742 and 28 U.S.C. 991-998, all reliable evidence is admissible at sentencing. The Act specifically provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. Under the former version of Section 3661, as Congress was aware, S. Rep. No. 307, 97th Cong., 1st Sess. 1219-1220 (1981), the courts had consistently held that even illegally obtained evidence and hearsay could be considered at sentencing, as long as it was reliable. See *United States* v. *Roberts*, 445 U.S. 552, 556 (1980); *United States* v. *Reme*, 738 F.2d 1156, 1167 (11th Cir. 1984), cert. denied, 471 U.S. 1104 (1985); *United States* v. *Lee*, 540 F.2d 1205, 1210-1211 (4th Cir.), cert. denied, 429 U.S. 894 (1976).[6]

The Sentencing Guidelines embrace those principles. Section 6A1.3 of the Guidelines provides that a district court can consider any reliable evidence, including hearsay, at sentencing. Sentencing Guidelines § 6A1.3 (Policy Statement).[7] If there is a question about the

[6] In determining the appropriate sentence for a particular defendant, the sentencing judge may even consider evidence of crimes for which that defendant has not been convicted. *Williams* v. *New York*, 337 U.S. at 244.

[7] Section 6A1.3 (Policy Statement) of the Guidelines provides that:

reliability of the information available to the court, the Guidelines endorse the practice of conducting an evidentiary hearing to resolve that question. *Ibid.* See *United States* v. *Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). But once the reliability of that information has been established, the court may use it to determine the appropriate punishment. *United States* v. *Silverman*, 889 F.2d 1531, 1535 (6th Cir. 1989); *United States* v. *Sciarrino*, 884 F.2d 95, 97 (3d Cir.), cert. denied, 493 U.S. 997 (1989); see also *United States* v. *Roberts*, 881 F.2d 95, 105-106 (4th Cir. 1989).[8]

Petitioners base their claim on the Confrontation Clause, but every court of appeals that has considered the issue has held that the Confrontation Clause does not apply at sentencing. *United States* v. *Tardiff*, 969 F.2d 1283, 1287 (1st Cir. 1992); *United States* v. *Prescott*, 920 F.2d 139, 143-144 (2d Cir. 1990); *United States* v. *Kikumura*, 918 F.2d 1084, 1102-1103 (3d Cir. 1990); *United States* v. *Johnson*, 935 F.2d 47, 50 (4th Cir.), cert.

> (a) * * * In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

The accompanying commentary expressly states that "[r]eliable hearsay evidence may be considered." Sentencing Guidelines § 6A1.3, Commentary.

[8] Petitioners' suggestion, *e.g.*, Pet. 19, that the holding in *Williams* v. *New York*, 337 U.S. at 245, 249-250, that hearsay may be considered at sentencing, has been superseded by the Sentencing Guidelines is without merit. As noted above, the Guidelines contemplate the consideration of reliable hearsay at sentencing. See Sentencing Guidelines § 6A1.3, Commentary.

denied, 112 S. Ct. 609 (1991); *United States* v. *Marshall*, 910 F.2d 1241, 1244 (5th Cir. 1990), cert. denied, 498 U.S. 1092 (1991); *United States* v. *Silverman*, 976 F.2d 1502, 1514 (6th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1595 (1993); *United States* v. *Jewel*, 947 F.2d 224, 237 & n.21 (7th Cir. 1991); *United States* v. *Wise*, 976 F.2d 393, 401 (8th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1592 (1993); *United States* v. *Beaulieu*, 893 F.2d 1177, 1180 (10th Cir.), cert. denied, 497 U.S. 1038 (1990); *United States* v. *Castellanos*, 904 F.2d 1490, 1496 (11th Cir. 1990).[9] Accordingly, there is no merit to petitioners' claim that the Confrontation Clause bars consideration of the Kessack hearsay statement in the instant case.

Although petitioners rely on *Specht* v. *Patterson*, 386 U.S. 605 (1967), that case is inapposite. In *Specht*, the Colorado Sex Offenders Act permitted a defendant to be sentenced to an indeterminate term of one day to life without notice or a full hearing. By contrast, petitioners enjoyed a panoply of procedural safeguards, including notice, a hearing, the assistance of counsel, and the opportunity to present favorable evidence and to rebut adverse evidence, such as the information in the Kessack proffer. Moreover, *Specht* specifically adhered, 386 U.S. at 608, to *Williams* v. *New York*, 337 U.S. at 245, 249-250, which held that due process did not bar a sentencing judge from considering information gathered from witnesses whom the defendant had neither confronted nor cross-examined. Finally, since *Specht* the Court has made clear that the Confrontation Clause does not

[9] In addition, three other circuits have held that the Due Process Clause does not require confrontation at sentencing. See *United States* v. *Carmona*, 873 F.2d 569, 574 (2d Cir. 1989); *United States* v. *Notrangelo*, 909 F.2d 363, 365-366 (9th Cir. 1990); *United States* v. *Giltner*, 889 F.2d 1004, 1008 (11th Cir. 1989).

exclude all hearsay evidence. See *Cruz* v. *New York*, 481 U.S. 186, 194 (1987); *Lee* v. *Illinois*, 476 U.S. 530, 543-544 (1986).

Petitioners' reliance on *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986), is also misplaced. The cited passage in *McMillan* merely reiterated the holding in *Specht* that trial-type protections need be applied at sentencing only where the defendant faces a new and more serious charge without notice or "any 'hearing in the normal sense.' " In this case, petitioners had ample notice that the district court might consider the Kessack statement, and the district court held two lengthy "hearing[s] in the normal sense" where they had multiple opportunities to rebut the information in the Kessack statement.

2. Petitioners also claim that Kessack's proffered statement was inherently unreliable and that its consideration at their sentencing therefore violated their due process rights. Pet. 31-51. That fact-specific claim does not warrant this Court's review. In any event, the district court correctly found that the Kessack statement was substantially corroborated by extrinsic evidence, and therefore had sufficient indicia of reliability to be considered at sentencing.

As petitioners note, Pet. 34, a court may not rely on "misinformation of constitutional magnitude" at sentencing. *United States* v. *Tucker*, 404 U.S. at 447. There was, however, no such reliance in the present case. Consistent with this Court's precedents, see, *e.g.*, *Lee* v. *Illinois*, 476 U.S. at 545, the district court initially deemed the Kessack statement "presumptively unreliable." 7/27/90 Tr. 168. The court considered that statement only after it had been corroborated by other record evidence, and only to the extent of such corroboration. *Id.* at 168-169. In finding that the conspiracy involved

more than 50 kilograms of cocaine, the court described the independent evidence corroborating the Kessack statement as follows, *id.* at 169-170:

> Independent testimony which substantiates the level of activity of these defendants includes without limitation [a witness's] testimony with respect to what Kessack was telling him the level of activity was for this conspiracy. Statements made by Mr. Kessack to [an undercover agent] about the level of activity and what he could produce. The testimony of [a witness] and admissions by Kessack to [that witness] of the level of activities of the conspiracy. The post-arrest statements and admissions by [a co-defendant]. The post-arrest admissions by [petitioner] Granger to [two witnesses] that he was dealing a kilo a month for five years. The tape recorded admissions of the level of activity * * * where one of the defendants said ten kilos a week for a six-month period. The testimony of the agents concerning the arrest of [petitioner] Petty in May of 1984 and the cash he had on his possession and the white powdery substance in his possession or in the possession of his traveling companion at that time. The testimony of other witnesses with respect to [the] substantial amount of cash in Petty's possession in February of 1984.

On the basis of that evidence, the court reached the following conclusion, 7/27/90 Tr. 170:

> Under all the circumstances, I feel substantial indicia of reliability has been presented by other corroborating evidence to rebut the presumption of unreliability of Mr. Kessack's sworn statement. I therefore feel that I should and must consider it. I have done so.

In light of the record established by the district court, the court of appeals correctly held that the Kessack statement had "sufficient indicia of reliability to support its probable accuracy." Sentencing Guidelines § 6A1.3(a). Accordingly, because Kessack's statement did not constitute "misinformation of constitutional magnitude," *Tucker*, 404 U.S. at 447, the requirements of due process were satisfied. See *United States* v. *Sciarrino*, 884 F.2d at 97; *United States* v. *Sunrhodes*, 831 F.2d 1537, 1542 (10th Cir. 1987).

Petitioners' reliance on *Idaho* v. *Wright*, *supra*, is misplaced. Although that case precludes a court from using extrinsic corroborating evidence to establish the reliability of hearsay at trial, it does not preclude the use of such evidence to establish the reliability of hearsay at sentencing. Because *Wright* involved an interpretation of the Confrontation Clause, it applies only at trial. *United States* v. *Kikumura*, 918 F.2d at 1103 n.21 ("In contrast to *Wright*, at a * * * sentencing hearing, the court is free, and indeed is required, to consider other evidence that substantiates the proffered hearsay statement.").

The courts have relied on extrinsic evidence to corroborate hearsay in a variety of sentencing contexts. See, *e.g.*, *United States* v. *Zuleta-Alvarez*, 922 F.2d 33, 37 (1st Cir. 1990) (hearsay evidence of quantity of drugs admissible at sentencing because corroborated by other witness testimony at grand jury and trial), cert. denied, 111 S. Ct. 2039 (1991); *United States* v. *Holmes*, 961 F.2d 599, 603 (6th Cir.) (corroboration of hearsay statement in presentence report by trial testimony generates sufficient indicia of reliability to be considered by sentencing court), cert. denied, 113 S. Ct. 232 (1992); *United States* v. *Jewel*, 947 F.2d 224, 236-238 (7th Cir. 1991) (court affirmed enhancement of offense level for

obstruction of justice that was based on hearsay allegation corroborated by extrinsic evidence); *United States* v. *Hubbard*, 929 F.2d 307, 309-310 (7th Cir.) (hearsay evidence of intent to cause bodily injury under Sentencing Guidelines § 2K1.4(c)(1) corroborated by physical evidence), cert. denied, 112 S. Ct. 206 (1991); *United States* v. *Rivers*, 917 F.2d 369, 373 (8th Cir. 1990) (where sentence enhancement is to be based on hearsay evidence, trial court should make "more searching inquiry" to determine whether sufficient corroborating evidence exists to support enhancement). As the court of appeals held, the district court in this case did not err in considering such evidence.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] The cases upon which petitioner relies do not support his position. Like *Idaho* v. *Wright*, *supra*, they involve the admission of hearsay statements at trial, not at sentencing. See *United States* v. *Flores*, 985 F.2d 770, 777 (5th Cir. 1993) (co-conspirator statements to grand jury); *United States* v. *Magana-Olvera*, 917 F.2d 401, 409 (9th Cir. 1990) (co-conspirator statements during witness interview); *United States* v. *Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977) (co-conspirator statements to grand jury).